JUN 8 2001

Supreme Court, U.S.
FILED
JUN 8 2001
CLERK

No. 00-730

In The
SUPREME COURT OF THE UNITED STATES

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of Department of Transportation, *et al,*
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. *AMICUS CURIAE* ON BEHALF OF PETITIONER

Valle Simms Dutcher
Southeastern Legal Foundation, Inc.
3349 Peachtree Road, NE,
Suite 2515
Atlanta, GA 30326
(404) 365-8500

Walter H. Ryland*
David H. Hallock, Jr.
Williams, Mullen, Clark & Dobbins
1021 E. Cary Street,
16th Floor
Richmond, VA 23219
(804) 783-6415

Attorneys for Amicus Curiae
**Counsel of Record*

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INTEREST OF THE AMICUS CURIAE [1]

Amicus Curiae, the Southeastern Legal Foundation, Inc., is a non-profit public interest organization that shares an interest in the proper construction and enforcement of the laws and the Constitution of the United States. The Southeastern Legal Foundation was established in Georgia for the purpose of participating in the public policy process. In addition to legislative initiatives and promulgation of programs designed to inform and educate the public, the organization endeavors to influence public policy through litigation.

The *amicus* opposes the institutionalization of racism in America that results from race based preferences. The *amicus* believes that, as Justice Stevens wrote, "a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race [and] can only exacerbate rather than reduce racial prejudice." *Fullilove v. Klutznick*, 448 U.S. 448, 545, (1980) (Stevens, J., dissenting). In other words, as Justice Brennan wrote, "preferential treatment may act to stigmatize its recipient groups, for although intended to

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[1] This brief was authored by the *amicus* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

correct systemic or institutional inequities, such a policy may imply to some of the recipients' inferiority and especial need for protection." *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-74, (1977) (Brennan, J., concurring in part). Instead, as Justice Scalia wrote in this very case, "under our Constitution there can be no such thing as either a creditor or debtor race[;] That concept is alien to the Constitution's focus upon the individual, and its rejection of dispositions based upon race, or based upon blood." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (*Adarand III*).

The *amicus* therefore supports the Petitioner in opposing the use of skin color to exclude certain individuals from public contracting. The important public policy questions that such exclusions raise, and that form the basis of the *amicus* interest in this case, relate to equal protection under the laws.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The evidence in this case in support of a compelling interest sufficient to warrant the adoption of a program of numerical proportionality is not qualitatively significant from that before the Court in *Croson* and *Fullilove*. Therefore, the issue of congruence under the Fourteenth and Fifth Amendments is crisply presented. The case is not appropriate for decision based on differences in the respective records.

Imposition of a remedy of numerical proportionality on the community at large is not an

appropriate response in the absence of identified discrimination by actors or against victims.

Government cannot continue to impose race-based numerical quotas to account for amorphous societal disadvantage that is as better ascribed to socio-economic status than race. In the absence of a discriminator and a victim, no remedy can ever be just.

Remedies which are so ageless in the past as to be based in any part on Richmond, Virginia's role as the capital of the Confederacy, as in Justice Blackmun's dissent in *Croson*, or as timeless in the future as the essentially similar "temporary" programs at issue in *Fullilove* enacted in 1977, should now be removed from consideration by all governmental agencies.

ARGUMENT

I.

The Government's Interest Is Not Sufficiently Compelling To Permit A Program of Numerical Proportionality.

The Court of Appeals cited *Croson* and *Shaw v. Hunt*, 517 U.S. 899, 909 (1996), for the proposition that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." App. at 25, citing *Croson*, 488 U.S. at 498-506 (O'Connor, J.) [2]

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[2] Justice O'Connor's opinion in *Croson* does not contain the language quoted from *Shaw*.

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the Subcontractor Compensation Clause ("SCC"):

> The [SBA] . . . declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality" and found that numerical proportionality requirements based on race in Federal contracts are appropriate as "aspirational goals." App. at 65.

The *amicus* submits that it is not a permissible remedial purpose to create a system of race-based preferences designed to achieve participation to the maximum practicable extent by race-designated companies in Federal contracting.

The Court of Appeals concluded that this was such a case in which a race-conscious remedy was appropriate. The stated reason was that:

> "the programs before us impose a significantly more flexible and less intrusive remedy—a voluntary subsidy as opposed to a fixed set-aside subject to waiver."

App. at 20. Implicit in the Tenth Circuit's opinion and "The Compelling Interest" is the idea that if <u>any</u> race-conscious action is appropriate a program of numerical proportionality is appropriate.

Such a conclusion is erroneous for two reasons. First, it is not factually correct. In *Adarand*, the contractor, Mountain Gravel & Construction, was obligated by contract to achieve the prescribed goal, was subject to penalty if he did not, and merely chose to be compensated under the SCC because the contract met the requirements for the financial assistance.

The second reason that a race-conscious remedy is inappropriate here is that the evidence in this case, like that in *Croson* and *Fullilove*, fails to identify the discrimination with the necessary particularity. The record reflects societal discrimination and generalized assertions of discrimination. Thus the compelling interest in lacking.

Adarand makes a compelling argument that the government has not identified discrimination with the specificity that justifies any race-based remedy. The necessity for any race-based "remedy" in this case is far less specifically identified than the hiring criteria approved in *United States v. Paradise,*[1] 480 U.S. 149 (1987) and reaffirmed in *Adarand III*, 515 U.S. 200, 237.

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[1] *Paradise* involved a judicial remedy imposed on an offender, not a legislative enactment imposing a racial preference on the community at large. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large. *Teachers v. Hudson*, 475 U.S. 292, 309-10 n. 22 (1986).

However, from the conclusion that some sort of race-conscious remedy might be permissible, it is a larger leap to justify the type of proportional representation approved by the Court of Appeals in this case. As this Court stated in *Adarand III*:

> But we agree with Justice Stevens that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, supra, at 533-535, 537. We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means.

515 U.S. at 236.

As Justice O'Connor noted in *Croson*:

> We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings" sufficient to

> ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the construction industry. Supp. App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant*, supra, at 275, 106 S.Ct., at 1847 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

488 U.S. at 498.

As the Chief Justice stated in *Shaw v. Hunt*, supra:

> A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions. *Croson*, 488 U.S. at 498-506. For that interest to rise to the level of a compelling state interest, it must satisfy two conditions. First, the discrimination must be "'identified discrimination.'" Id., at 499, 500, 505, 507, 509. "While the States and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Id., at 504.

> A generalized assertion of past discrimination in a particular industry or region is not adequate because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." Id., at 498. (opinion of O'Connor, J.).

517 U.S. at 909.

Cases involving race-conscious distinctions in various contexts have been approved. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987)(hiring goal); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971)(school desegregation); *Metal Workers v. EEOC*, 478 U.S. 412 (1986). Each of these cases involved a remedy imposed on a violator and to the benefit of a victim.

There are clear distinctions between the race-conscious remedies which have been approved and programs of numerical proportionality.

The hiring goal remedy in *Paradise* was described as "temporary," and applied only if the governmental body failed to provide a promotion procedure that does not have an adverse impact on minorities. Id., 480 U.S. at 184.

A key distinction between the remedies in the employment and desegregation cases arises when the remedy is imposed on an offender rather than the public.

> A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief

> exceed the bounds of "reasonableness." The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L. Ed. 2d 260 (1986), and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L. Ed. 2d 902 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution.

Paradise, 480 U.S. at 192 (Stephens, J., Concurring), citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-698 (1978). See also *International Salt Co. v. United States*, 332 U.S. 392, 400-401 (1947); *Teachers v. Hudson*, 475 U.S. 292, 309-310, n. 22 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large")(citations omitted).

The legislative enactment is a race-conscious preference without a particularized finding of discrimination.

This is improper where "in the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson*

Board of Education, 476 U.S. 267, 276 (1986). (opinion of O'Connor, J.).

B.

The Government's Evidence Of Compelling Interest Was Not Materially Different From That In *Croson* And *Fullilove*

The evidence introduced in support of the government's compelling interest in this case was essentially the same as that presented in *Fullilove* and *Croson*. There is no qualitative difference in any of the records. In each case, there was evidence that minority-owned firms faced difficulties in competing for government contracts because of societal forces. In each case the governmental body concluded that the difficulties were the result of discrimination. The result was the same in each case: promulgation of a program designed to provide contracting opportunity proportional to the availability of minority firms.

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the subcontractor compensation clause:

> The [SBA]...declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality." App. at 65.

The quantity of paperwork cited by the government was probably greater in this case. Qualitatively, that is analogous to loudly repeating the same point to the speaker of a foreign language.

The record in the Court of Appeals consisted of statistical evidence of the following:

1. The tendency of company owners to pass ownership of their companies to members of their families instead of members of minority groups, App. at 34-35;

2. The difficulty people with no experience have in joining a union in order to gain the experience needed to compete with established non-minority companies, App. at 35.

3. The difficulty of obtaining access to capital in the absence of a credit history or collateral, App. At 35.

4. The tendency of prime contractors to work with subcontractors they already trust because they have worked with those subcontractors before, App. at 39-40;

5. "Bid shopping," a practice by which prime contractors allow trusted

former subcontractors to see and beat any lower bid from new, untested firms trying to replace those former subcontractors before, App. at 40;

6. The inability of new enterprises to obtain bonding because they lack experience, which in turn hampers their ability to gain experience, App. at 41-43; and

7. The inability of new market entrants to receive special pricing arrangements from suppliers from whom they have never purchased anything before, App. at 43-44.

Similarly, in *Croson*, the record consisted of the following evidence:

1. The City of Richmond's history of public and private racial discrimination including serving as the Capital of the Confederacy in the Civil War. 488 U.S. at 529, (Marshall, J. Dissenting).

2. Few, if any, minority members of trade associations. Id.

3. Receipt of few construction dollars by minority firms. Id.

4. Testimony that discrimination had been widespread in the local construction industry. Id.

5. Studies relied on in *Fullilove* to show discrimination in the construction industry. Id.

6. National discrimination. Id.

   a. Deficiencies in working capital. Id.

   b. Inability to meet bonding requirements. Id.

   c. Lack of a track record. Id.

   d. Lack of an awareness of bidding opportunities. Id.

   e. Unfamiliarity with bidding procedures. Id.

   f. Pre-selection of bidders. Id.

   g. Procurement officers using discretion to disfavor minority businesses. Id.

7. Remedial nature of program. Id., at 478 (O'Connor, J.)

8. To promote wider participation. Id., at 713 (O'Conner, J.)

Likewise, in *Fullilove* the identified factors were:

1. Need to provide a fair opportunity to participate. Id., 448 U.S. at 459.

2. Disparity between minority population and participation in dollars. Id., at 459.

3. Difficulty of minorities in understanding the bidding process. Id., at 461, 467.

4. Deficiencies in working capital of minority-owned firms. Id., at 467.

5. Inability of minority-owned firms to meet bonding requirements. Id.

6. Inadequate track record of minority-owned firms. Id.

7. Lack of awareness of bidding opportunity by minority-owned firms. Id.

8. Pre-selection of minority-owned firms. Id.

9. Exercise of discretion to disfavor minority-owned businesses. Id.

Finally, in *Fullilove*, the Congress had before it a report that presented the basis for the legislation, "Minority Enterprises and Allied Problems of Small Business, H.R. Rep. No. 94-1791 (1977) and an earlier version, H.R. Rep. No. 94-468 (1975). As in the present case, these reports functioned as a proxy for "The Compelling Interest" and the testimony and documentary production at the City Council hearing in *Croson*. See, Appendix – The Compelling Interest For Affirmative

Action in Federal Procurement, 61 Fed. Reg. 26,060 (1996).

In *Fullilove*, the 10% goal program, which had been adopted pursuant to the Public Works Employment Act of 1977, was described as "temporary." 448 U.S. at 547-48 (Stevens, J., dissenting) But as the history of the Federal programs reflected in the instant case demonstrates, amorphous standards applied to minority contracting will have no terminus when not firmly anchored in evidence of either a particular offender or an identifiable victim of discrimination. In the absence of evidence identifying a violator and a victim, race-conscious remedies serve only to perpetuate racial stereotyping and promote the very evil they purport to eradicate.

CONCLUSION

For the foregoing reasons, the SCC and the administration of the small business DBE program of the Small Business Act should be declared unconstitutional and enjoined.

The decision of the Court should bring finality to the use of programs of numerical proportionality in government programs as a remedy for discrimination.

Respectfully submitted,

Valle Simms Dutcher
Southeastern Legal
Foundation, Inc.
3349 Peachtree Road, NE,
Suite 2515
Atlanta, GA 30326
(404) 365-8500

s/Walter H. Ryland
Walter H. Ryland*
David H. Hallock, Jr.
Williams, Mullen, Clark
& Dobbins
1021 E. Cary Street,
16th Floor
Richmond, VA 23219
(804) 783-6415

Attorneys for Amicus Curiae,
**Counsel of Record*